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No. 99-1815

In the Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

KENTUCKY RIVER COMMUNITY CARE, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board reasonably concluded that an employee's exercise of ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards does not constitute the exercise of "independent judgment" that makes the employee a "supervisor" under Section 2(11) of the National Labor Relations Act, 29 U.S.C. 152(11).

2. Whether the Board permissibly requires the party who alleges that an employee is excluded from the rights and protections afforded by the Act as a supervisor to bear the burden of proving the individual's supervisory status.

3. Whether, applying its interpretation of "independent judgment" and its allocation of the burden of proving supervisory status, the Board reasonably concluded that respondent's registered nurses are "employees," rather than supervisors, and thus entitled to the rights and protections afforded by the Act.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
Summary of argument	11
Argument	14
I. The Board's interpretation of "independent judgment" is rational and consistent with the Act	14
A. The Board's interpretation is longstanding and widely applied	16
B. The Board's interpretation is consistent with the text of Section 2(11)	22
C. The Board's interpretation furthers Section 2(11)'s purpose	24
D. The Board's interpretation properly accommodates the Act's coverage of "professional employees"	32
E. The court of appeals erred in substituting its own interpretation of "independent judgment" for that of the Board	34
II. The Board's rule regarding the allocation of the burden of proving supervisory status is reasonable and permissible under the Act	36
A. The Board's rule accords with principles of statutory construction and furthers the purpose behind the Act's exemption of supervisors	37
B. Practical considerations also support the Board's rule	39

Table of Contents—Continued: Page

III. The RNs working at Caney Creek are not supervisors 42
Conclusion 48

TABLE OF AUTHORITIES

Cases:

AFL v. *NLRB*, 308 U.S. 401 (1940) 40
Adco Elec. Inc., 307 N.L.R.B. 1113 (1992), enfoced, 6 F.3d 1110 (5th Cir. 1993) 22, 45
Ahrens Aircraft, Inc., 259 N.L.R.B. 839 (1981), enforced, 703 F.2d 23 (1st Cir. 1983) 37
Angelo C. Scavullo, 109 N.L.R.B. 1327 (1954) 19
Arlington Elec., Inc., 332 N.L.R.B. No. 74, 2000 WL 1614380 (Oct. 24, 2000) 17
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Atlanta Newspapers, 306 N.L.R.B. 751 (1992) 19
Auciello Iron Works, Inc. v. *NLRB*, 517 U.S. 781 (1996) 12, 16, 34
Barre-Nat'l, Inc., 316 N.L.R.B. 877 (1995) 40
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Beverly Cal. Corp. v. *NLRB*, 970 F.2d 1548 (6th Cir. 1992) 36
Beverly Enters.-Mass., Inc. v. *NLRB*, 165 F.3d 960 (D.C. Cir. 1999) 41, 47
Boardman Co., 55 N.L.R.B. 105 (1944) 26
Boire v. *Greyhound Corp.*, 376 U.S. 473 (1964) 40, 41
Bourne of Houston, Inc., 280 N.L.R.B. 1222 (1986) 37-38
Bunting Brass & Bronze Co., 58 N.L.R.B. 618 (1944), aff'd on further consideration, 63 N.L.R.B. 818 (1945) 26
Capital Transit Co., 114 N.L.R.B. 617 (1955) 17

Cases—Continued: Page

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Commercial Movers, Inc., 240 N.L.R.B. 288 (1979) 38
Commonwealth Edison Co., 60 N.L.R.B. 1365 (1945) 27
Douglas Aircraft Co., 50 N.L.R.B. 784 (1943) 25
Duval Tex. Sulphur Co., 53 N.L.R.B. 1387 (1943) 26
Endicott Johnson Corp., 67 N.L.R.B. 1342 (1946) 27
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General Chem. Co., 64 N.L.R.B. 357 (1945) 26-27
General Dynamics Corp., 213 N.L.R.B. 851 (1974) 20
Golden West Broadcasters-KTLA, 215 N.L.R.B. 760 (1974) 19, 20, 46
Grancare, Inc. v. *NLRB*, 137 F.3d 372 (6th Cir. 1998) 10, 36, 37, 39, 40
Graphics Typography, Inc., 217 N.L.R.B. 1047 (1975), enforced mem., 547 F.2d 1162 (3d Cir. 1976) 3, 11, 16, 18, 19
Health Care & Retirement Corp., 328 N.L.R.B. No. 156, 1999 WL 562096 (July 27, 1999) 19, 48
Holly Farms Corp. v. *NLRB*, 517 U.S. 392 (1996) 13, 38
Hydro Conduit Corp., 254 N.L.R.B. 433 (1981) 17, 38
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Magnesium Casting Co. v. *NLRB*, 401 U.S. 137 (1971) 41
Marine Eng'rs Beneficial Ass'n v. *Interlake S.S. Co.*, 370 U.S. 173 (1962) 34
Mid-America Care Found. v. *NLRB*, 148 F.3d 638 (6th Cir. 1998) 10, 36
Mississippi Power & Light Co., 328 N.L.R.B. No. 146, 1999 WL 551405 (July 26, 1999) 17
Mitchell v. *Kentucky Fin. Co.*, 359 U.S. 290 (1959) 38
NLRB v. *Bakers of Paris, Inc.*, 929 F.2d 1427 (9th Cir. 1991) 41
NLRB v. *Bell Aerospace Co.*, 416 U.S. 267 (1974) 24, 29, 31, 39
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Pittsburgh Plate Glass Co. v. *NLRB*, 313 U.S. 146 (1941) 41
Providence Hosp., 320 N.L.R.B. 717 (1996), enforced, 121 F.3d 548 (9th Cir. 1997) 3, 11, 15, 22, 33, 45
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Skidmore, Owings & Merrill, 192 N.L.R.B. 920 (1971) 20
Somerset Welding & Steel, Inc., 291 N.L.R.B. 913 (1988) 18
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Statutes and regulations: Page

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§ 2(3), 29 U.S.C. 152(3) 2, 38
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§ 2(12), 29 U.S.C. 152(12) 12, 32, 33
§ 2(12)(a)(ii), 29 U.S.C. 152(12)(a)(ii) 32
§ 7, 29 U.S.C. 157 9
§ 8(a)(1), 29 U.S.C. 158(a)(1) 9
§ 8(a)(5), 29 U.S.C. 158(a)(5) 9, 40
§ 9(c), 29 U.S.C. 159(c) 40
§ 9(c)(1), 29 U.S.C. 159(c)(1) 40
§ 10(f), 29 U.S.C. 160(f) 40
29 C.F.R.:
Section 101.20(c) 40
Section 102.67(f) 41

Miscellaneous:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 193 F.3d 444. The decision and order of the National Labor Relations Board in the unfair labor practice proceeding (Pet. App. 26a-33a) are noted at 323 N.L.R.B. No. 209 (Table). The decisions of the Board in the underlying representation proceeding (Pet. App. 34a-60a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 61a-63a) was entered on January 27, 2000. A petition for rehearing was denied on March 23, 2000 (Pet. App. 64a-65a). The petition for a writ of certiorari was filed on May 12, 2000, and was granted on September 26, 2000. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2(3) of the National Labor Relations Act (NLRA or Act), 29 U.S.C. 152(3), provides in relevant part:

> The term "employee" shall include any employee * * * but shall not include * * * any individual employed as a supervisor.

Section 2(11) of the Act, 29 U.S.C. 152(11), provides:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

STATEMENT

1. To be a supervisor under Section 2(11) of the National Labor Relations Act, an employee must have authority, in the interest of the employer, to perform one of 12 specified supervisory functions, and the employee's exercise of that authority must not be "of a merely routine or clerical nature," but must require "the use of independent judgment." 29 U.S.C. 152(11). The principal issue in this case is the reasonableness of the interpretation that the National Labor Relations Board (NLRB or Board) has given the phrase "independent judgment." Also at issue is the reasonableness of the Board's rule that the party who alleges that an employee is a supervisor bears the burden of proving the individual's supervisory status. See, *e.g.*, *St. Alphonsus Hosp.*, 261 N.L.R.B. 620, 624 (1982), enforced mem., 703 F.2d 577 (9th Cir. 1983) (Table).

In *NLRB* v. *Health Care & Retirement Corp. of America* (*HCR*), 511 U.S. 571, 574, 584 (1994), this Court held that the Board had mistakenly applied a special test of supervisory status for the health-care industry based on an incorrect interpretation of the phrase "in the interest of the employer." Following *HCR*, the Board decided to apply to nurses its "traditional analysis" for determining the supervisory status of employees. See *Providence Hosp.*, 320 N.L.R.B. 717 (1996), enforced, 121 F.3d 548 (9th Cir. 1997). Under that analysis, an employee does not exercise the "independent judgment" that triggers supervisory status under the Act when the employee exercises ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards. See *id.* at 729. See also, *e.g.*, *Graphics Typography, Inc.*, 217 N.L.R.B. 1047, 1053 (1975), enforced mem., 547 F.2d 1162 (3d Cir. 1976) (Table). In this case, applying that test, the Board concluded that the registered nurses (RNs) employed by respondent Kentucky River Community Care are not supervisors.

2. a. Respondent is a nonprofit organization that operates mental health facilities in Kentucky. This case involves the Caney Creek Rehabilitation Center, a transitional residential center for mentally ill individuals who are seeking to develop skills necessary for independent living. Respondent operates Caney Creek under contracts with the Commonwealth of Kentucky Department for Mental Health and Mental Retardation. The contracts, which incorporate by reference certain provisions of Kentucky law, set forth eligibility restrictions for residents, facility staffing requirements, and

other guidelines that govern the services provided by respondent. Pet. App. 2a, 5a, 37a-39a. Caney Creek is organized into two wings, each of which is divided into two units that each accommodates 20 residents. The facility operates 24 hours per day, seven days a week. *Id.* at 45a. Overall responsibility for the operation of Caney Creek is vested in an administrator and assistant administrator. Caney Creek also employs two unit coordinators, as well as a nursing coordinator. There is also a recreational counselor, a manager for housekeeping and maintenance, and a kitchen supervisor. *Ibid.* All of those individuals are stipulated to be Section 2(11) supervisors. *Id.* at 54a.

Caney Creek employs 20 rehabilitation counselors, 40 rehabilitation assistants, six RNs, and three licensed practical nurses (LPNs). Pet. App. 45a; J.A. 8, 15, 29. Each of the four treatment units is staffed with five rehabilitation counselors and ten rehabilitation assistants. Pet. App. 6a, 45a. The RNs and LPNs provide medical services to residents throughout the units. *Id.* at 45a, 50a. Two RNs and one LPN generally work on each of three shifts (7 a.m. to 3:30 p.m., 3 p.m. to 11:30 p.m., and 11 p.m. to 7:30 a.m.), although occasionally only one RN works on the third shift. *Id.* at 50a; J.A. 16, 35-36, 41-42, 43-44.

For each resident, Caney Creek establishes a treatment plan that contains rehabilitative goals and specifies activities designed to accomplish those goals. Pet. App. 46a. The treatment plan also has a medical component, because all residents receive some form of medication. The rehabilitation counselors and RNs participate in the formulation of the plans, but each resident's treatment plan must be approved by the unit coordinator and the resident's psychiatrist. *Id.* at 19a-20a, 46a; J.A. 12, 33. The RNs work with and occasionally direct less-skilled employees to deliver services in accordance with the employer-specified standards expressed in the treatment plans.[1]

The non-medical component of the treatment plans is implemented on a daily basis by the rehabilitation assistants. Each morning, the rehabilitation counselors meet with the rehabilitation assistants, who volunteer for particular tasks. Pet. App. 20a, 47a-48a. The rehabilitation assistants ensure that the residents wake up on time, are properly bathed and dressed, attend scheduled classes, and keep their doctors' appointments. *Id.* at 47a-48a; J.A. 13.

The medical component of the treatment plans is implemented on a daily basis by the RNs and LPNs. Pet. App. 17a, 45a, 46a; J.A. 17, 18, 33. The LPNs pass medications to the residents. The RNs ensure that the correct medication is passed to the correct resident at the correct time, handle any necessary documentation, and provide direct medical care to the residents. Pet. App. 17a, 50a; J.A. 17, 18, 29, 33, 52. The RNs also work with the rehabilitation assistants: the assistants bring the residents' health problems to the RNs' attention and assist the RNs in administering medication "if a resident is really acting out." J.A. 57-61.

During part of the second and all of the third shift, and on weekends, neither the administrator nor any other stipulated supervisor is physically present at

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[1] The provision of services to residents at Caney Creek is "treatment plan directed." J.A. 46. The treatment plans are kept on file at the work stations between the units and are "very similar to the medical records that you would find in most—in any residential or hospital setting." J.A. 11, 13. The elements of the treatment plans must conform to the specifications set out in the contracts with Kentucky. See J.A. 70-75; J.A. 11 (treatment plans are "regulated as to what needs to be included in those plans").

Caney Creek. However, a stipulated supervisor is always "on call" at those times. When the stipulated supervisor is "on call" rather than on site, an RN on duty is designated by respondent as "building supervisor." Pet. App. 16a, 50a; J.A. 18, 36, 39. The same RN may be an ordinary nurse on one day of the week and the building supervisor on another day of the week. See J.A. 22-23, 42. Moreover, the RNs on the second shift are not notified as to when during the shift they assume their building-supervisor responsibilities. J.A. 50-51. When serving as building supervisor, an RN receives no extra compensation. Pet. App. 50a; J.A. 37.

As building supervisors, the RNs have some additional duties. Although there is no job description for the position, J.A. 37, according to a memorandum issued by respondent, the building supervisors are "in charge of the facility and all rehabilitation staff." J.A. 62. As a practical matter, "the only extra responsibility assumed by the RNs when serving as 'building supervisors' is to obtain needed help if for some reason a shift is not fully staffed." Pet. App. 51a. When the building supervisors "come on duty," they are "[to] visit the units to check the coverage," and, "[i]f necessary, pull from one unit to another." J.A. 63. However, the number of employees necessary to cover a given shift is set by management. J.A. 23-24, 28-29. The building supervisors transfer employees from one unit to another for the particular shift simply "[t]o make sure the head count is there." J.A. 29; see J.A. 22, 27.

The building supervisors also handle staff shortages when employees telephone that they are unable to report for their scheduled shift. Pet. App. 16a, 51a; J.A. 62, 64. In those situations, the building supervisors first seek a volunteer from the preceding shift to stay over. If no one volunteers, the building supervisors,

using a list, attempt to reach by telephone an off-duty employee who lives nearby to come in to work. Pet. App. 51a; J.A. 19-20, 64. In no case, however, do the building supervisors have authority to compel the employee to work under threat of discipline. Pet. App. 16a, 51a; J.A. 38.

According to a memorandum issued by respondent, the building supervisors are authorized to "write up" an employee who does not "comply" with a decision "to shift staff between units." Pet. App. 16a; J.A. 63. Respondent also contends that they have authority to "send an employee home" in some circumstances. Pet. App. 17a; J.A. 20-21. The record contains no evidence as to the consequences if an employee were "writ[ten] up" as contemplated in the memorandum. Indeed, there is no evidence in the record that the building supervisors have ever actually exercised authority either to "write up" an employee or to send an employee home. Pet. App. 51a; J.A. 26-27, 38, 55-56.

b. In January 1997, the Kentucky State District Council of Carpenters (Union) filed a petition with the Board seeking to represent an appropriate bargaining unit of employees at Caney Creek. Respondent contended that the RNs and the rehabilitation counselors should be excluded from any bargaining unit as Section 2(11) supervisors.[2] After a hearing, the Board's Regional Director (RD) rejected that contention. Pet. App. 46a-53a. The RD explained that, after this Court's decision in *HCR*, "the Board determined to apply the

[2] Respondent also contended that it is exempt from the Board's jurisdiction as a "political subdivision" of the Commonwealth of Kentucky. Both the Board and the court of appeals rejected that contention, Pet. App. 8a-13a, 37a-44a, and respondent has not sought this Court's review of that determination.

same test to registered nurses as is applicable to all other individuals in determining supervisory status." *Id.* at 52a. The RD also noted that *HCR* did not "alter[]" the Board's "well settled" rule that "the burden of proving that an individual is a supervisor within the meaning of Section 2(11) of the Act rests with the party asserting supervisory status." *Ibid.*

Applying those principles, the RD concluded that respondent had "not met its burden of establishing that the RNs, even when serving as 'building supervisors,' are supervisors within the meaning of Section 2(11) of the Act." Pet. App. 53a. The RD found that "the RNs may occasionally request other employees to perform routine tasks, but they apparently have no authority to take any action if the employee refuses their directives." *Id.* at 51a. He found that "the RNs, including when they are serving as 'building supervisors,' for the most part, work independently and by themselves without any subordinates." *Id.* at 52a. Although respondent contended that "RNs can 'write up' employees," the RD found that "there is no evidence in the record that they have ever done so." *Id.* at 51a. In fact, in the only instance in the record in which "an RN made a complaint about another employee it was apparently ignored" by management. *Ibid.* The RD further found that "[t]he 'building supervisors' do not have any authority * * * to compel an employee to stay over or come in to fill a vacancy under threat of discipline." *Ibid.* He concluded that "[t]he fact that the RNs may request employees to perform routine tasks and, pursuant to established policy, call in replacements or seek volunteers to stay over does not establish supervisory status." *Id.* at 53a. The RD also found that the rehabilitation counselors are not supervisors. *Id.* at 49a.

c. Respondent requested the Board's review of the RD's decision. Insofar as relevant here, the Board denied the request for review. Pet. App. 34a. On March 20, 1997, the Board conducted an election among the employees at Caney Creek, which the Union won. Accordingly, the Board certified the Union as the bargaining representative of the employees, including the RNs and the rehabilitation counselors. *Id.* at 28a-29a.

Respondent refused to bargain with the Union. Pet. App. 29a. Acting on a charge filed by the Union, the Board's General Counsel issued a complaint alleging that respondent's refusal to bargain with the Union violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1). Pet. App. 26a.[3] On summary judgment, the Board found that respondent had violated the Act and ordered respondent to bargain with the Union. *Id.* at 26a-33a.

3. Respondent filed a petition for review of the Board's order in the United States Court of Appeals for the Sixth Circuit. The court of appeals sustained the Board's finding that the rehabilitation counselors are not supervisors under Section 2(11) of the Act but held, by a divided vote, that "the registered nurses [that respondent] employs are supervisors." Pet. App. 2a. The court therefore denied enforcement of the Board's order "insofar as it includes the registered nurses in the bargaining unit." *Ibid.*

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[3] Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." 29 U.S.C. 158(a)(5). Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]" of the Act, 29 U.S.C. 157, among which is the right of employees "to bargain collectively through representatives of their own choosing." 29 U.S.C. 158(a)(1).

The court of appeals explained that its task in this case was to determine whether the RNs' responsibilities "call for the exercise of 'independent judgment' under section [2(11)]." Pet. App. 17a. The court stated:

> Unfortunately, the NLRB has continuously interpreted "independent judgment" in a manner that is inconsistent with this circuit's precedent. According to NLRB interpretations, the practice of a nurse supervising a nurse's aide in administering patient care, for example, does not involve "independent judgment." The NLRB classifies these activities as "routine" because the nurses have the ability to direct patient care by virtue of their training and expertise, not because of their connection with "management."

Ibid.

The court of appeals observed that it "has repeatedly rejected this interpretation" of "independent judgment" and has instead "found that nurses are supervisors when they direct assistants with respect to patient care, rectify staffing shortages, fill out evaluation forms, and serve as the highest ranking employee in the building during off-peak shifts." Pet. App. 17a (citing *Mid-America Care Found.* v. *NLRB*, 148 F.3d 638 (6th Cir. 1998)). The court also faulted the Board for "ignor[ing] our repeated admonition that '[t]he [NLRB] has the burden of proving that employees are not supervisors.'" *Id.* at 15a (quoting *Grancare, Inc.* v. *NLRB*, 137 F.3d 372, 375 (6th Cir. 1998)).

Applying its own understanding of "independent judgment" and the burden of proof, the court of appeals reasoned that the Caney Creek RNs are supervisors because they "direct the LPNs in the proper dispensing of medication, regularly serve as the highest ranking

employees in the building, seek additional employees in the event of a staffing shortage, move employees between units as needed, and have the authority to write up employees who do not cooperate with staffing assignments." Pet. App. 18a-19a. The court concluded that those duties "involve independent judgment." *Ibid.*[4]

Judge Jones dissented in part. He agreed with the majority's holding that the rehabilitation counselors are not statutory supervisors. Pet. App. 22a. However, based on the reasoning of the Regional Director, he would have reached the same conclusion with respect to the RNs. *Id.* at 23a-25a.

SUMMARY OF ARGUMENT

I. The National Labor Relations Board has long held that an employee does not exercise "independent judgment" that triggers supervisory status under Section 2(11) of the National Labor Relations Act when he uses ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards. See *Providence Hosp.*, 320 N.L.R.B. 717, 729 (1996), enforced, 121 F.3d 548 (9th Cir. 1997). See also, *e.g.*, *Graphics Typography, Inc.*, 217 N.L.R.B. 1047, 1053 (1975), enforced mem., 547 F.2d 1162 (3d Cir. 1976) (Table). That inter-

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[4] The court of appeals upheld the Board's finding that the rehabilitation counselors are not supervisors. The court explained that the rehabilitation counselors' primary function of designing a patient treatment plan "does not, of itself, involve any supervisory authority." Pet. App. 21a. Moreover, the fact that the assistants "carry out the provisions of the treatment plans designed by the counselors does not suggest that the counselors are supervisors." *Ibid.* Respondent has not sought review of that holding by this Court.

pretation, which the Board has applied to a variety of industries and employees, is entitled to deference because it is rational and consistent with the Act. See, *e.g.*, *Auciello Iron Works, Inc.* v. *NLRB*, 517 U.S. 781, 787-788 (1996).

The Board's interpretation is supported by the text of Section 2(11). The use of both the limiting phrase "not of a merely routine or clerical nature" and the adjective "independent," suggests that, in order to be considered a supervisor, an employee must exercise judgment beyond that involved in regular or customary activities and which is not controlled or significantly constrained by outside sources. The Board's interpretation also advances Section 2(11)'s purpose of excluding from the Act's coverage those employees who exercise true managerial power while preserving the Act's protections for employees with minor supervisory responsibilities. Moreover, the Board's view reflects Congress's intent to adopt the Board's practice under the Wagner Act of excluding from supervisory status employees who, in addition to doing their own work, provided limited direction for others based on technical skills or employer-specified standards. Finally, the Board's interpretation of "independent judgment" harmonizes Section 2(11)'s exclusion of supervisors with Section 2(12)'s inclusion within the Act of "professional employees," who, by definition, exercise "discretion and judgment."

The court of appeals erred in concluding that this Court's decision in *NLRB* v. *Health Care & Retirement Corp. of America*, 511 U.S. 571 (1994), precludes deference to the Board's interpretation. *HCR* rejected only the Board's now-abandoned test for determining the supervisory status of nurses, which was based on an interpretation of Section 2(11)'s phrase "in the interest

of the employer." *Id.* at 574, 576. The Court made clear that its decision cast no doubt on Board decisions interpreting other parts of Section 2(11). *Id.* at 583. Indeed, the Court expressly pointed out that the phrase "independent judgment" is "ambiguous" and that the Board is therefore entitled to "ample room" in applying it. *Id.* at 579.

II. The Board has also long held that the party who alleges that an employee is excluded from the coverage of the Act as a supervisor bears the burden of proving the individual's supervisory status. See, *e.g.*, *St. Alphonsus Hosp.*, 261 N.L.R.B. 620, 624 (1982), enforced mem., 703 F.2d 577 (9th Cir. 1983) (Table). The court of appeals erred in rejecting that rule, which has been upheld by other courts of appeals, and is reasonable and permissible under the Act. See *NLRB* v. *Transportation Mgmt. Corp.*, 462 U.S. 393, 402-403 (1983).

The Board's rule, which it applies regardless of the industry involved or the party that is asserting the claim of supervisory status, is consistent with the general principle that the burden of proving entitlement to an exemption from a statutory provision rests on the one who claims the exemption's benefits. *E.g.*, *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 44-45 (1948). The Board's rule also furthers Congress's intent that the Act's exclusion of supervisors should apply only to individuals who are "truly supervisory" and exercise "genuine management prerogatives." S. Rep. No. 105, 80th Cong., 1st Sess. Pt. 1, at 4, 19 (1947). See also *Holly Farms Corp.* v. *NLRB.*, 517 U.S. 392, 399 (1996). Finally, the court of appeals' rule, which puts the burden of proving lack of supervisory status on the Board, presents practical difficulties, because the question of supervisory status is often determined in representa-

tion proceedings, in which neither the Board nor its General Counsel has an advocacy role.

III. Applying its interpretation of "independent judgment" and its rule regarding allocation of the burden of proving supervisory status, the Board reasonably concluded that the RNs employed by respondent are not supervisors. Their limited direction of LPNs and rehabilitation assistants does not involve "independent judgment." Rather, it is based on their professional competence and role as the more experienced member of a team, and it is circumscribed by the requirements of the treatment plans specified by respondent. The RNs' responsibility to ensure coverage at staff levels set by respondent, by following procedures that leave little room for discretion, likewise is not supervisory. Finally, the RNs' service as the highest ranking employee on site during certain hours does not entail the exercise of any supervisory function specified in Section 2(11), and respondent failed to meet its burden of proving that the RNs have disciplinary authority over other employees.

ARGUMENT

I. THE BOARD'S INTERPRETATION OF "INDEPENDENT JUDGMENT" IS RATIONAL AND CONSISTENT WITH THE ACT

Under Section 2(11) of the National Labor Relations Act, an employee is a "supervisor" only if the employee has authority "in the interest of the employer" to perform one of 12 specified supervisory functions, and the employee's exercise of that authority is not "of a merely routine or clerical nature," but "requires the use of independent judgment." 29 U.S.C. 152(11). In *NRLB* v. *Health Care & Retirement Corp. of America*, 511 U.S. 571 (1994), this Court considered the validity

of the Board's approach at that time to determining whether a nurse is a supervisor under Section 2(11). Under that approach, "a nurse's direction of less-skilled employees, in the exercise of professional judgment incidental to the treatment of patients," was not authority exercised "in the interest of the employer." *Id.* at 574, 576. The Court held that the Board's interpretation of "in the interest of the employer" was inconsistent with the ordinary meaning of that phrase and prior decisions of the Court, and improperly created a special test of supervisory status for the health-care industry. *Id.* at 574, 576-584. The Court explained, however, that "phrases in § 2(11) such as '*independent judgment*' and 'responsibly to direct' are ambiguous, so the Board needs to be given ample room to apply them to different categories of employees." *Id.* at 579 (emphasis added). The Court did not rule on the proper interpretation of any statutory element other than "in the interest of the employer." *Id.* at 583.

The principal issue in this case is whether the Board's current approach to determining whether a nurse is a supervisor under Section 2(11) of the Act—which the Board developed after *HCR* and which turns on the statutory term "independent judgment," rather than the phrase "in the interest of the employer"—is reasonable. The Board developed its current approach in two cases in which it heard oral argument and considered the submissions of numerous amici. See *Providence Hosp.*, 320 N.L.R.B. 717 (1996), enforced, 121 F.3d 548 (9th Cir. 1997); *Nymed, Inc.*, 320 N.L.R.B. 806 (1996). After carefully examining the structure of the Act, the legislative history of Section 2(11), and the relevant case law, including *HCR*, the Board decided to apply to nurses its "traditional analysis for determining

the supervisory status of employees in other occupations." *Providence Hosp.*, 320 N.L.R.B. at 717.

Under the Board's traditional analysis, an employee's exercise of ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards is not the exercise of "independent judgment" that makes an employee a "supervisor" under Section 2(11). See *Providence Hosp.*, 320 N.L.R.B. at 729. See also, *e.g.*, *Graphics Typography, Inc.*, 217 N.L.R.B. 1047, 1053 (1975), enforced mem., 547 F.2d 1162 (3d Cir. 1976) (Table). The court of appeals in this case erred in rejecting that view, which is rational and consistent with the Act. See, *e.g.*, *Auciello Iron Works, Inc.* v. *NLRB*, 517 U.S. 781, 787-788 (1996); *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 796 (1990); *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 42 (1987).

A. The Board's Interpretation Is Longstanding And Widely Applied

The Board has long held that whether an employee is a supervisor depends on the degree of judgment or discretion exercised by the employee in the performance of any of the supervisory duties specified in Section 2(11). See, *e.g.*, *Weyerhaeuser Timber Co.*, 85 N.L.R.B. 1170, 1173 (1949) (employee does not exercise "such a degree of independent judgment or discretion in the performance of his duties as would warrant a finding that he is a supervisor within the meaning of Section 2(11)"); *Southern Paperboard Corp.*, 84 N.L.R.B. 822, 824 (1949) (same). "Consequently, an employee does not become a supervisor merely because he gives some instructions or minor orders to other employees." *Chicago Metallic Corp.*, 273 N.L.R.B. 1677, 1689 (1985), enforced in relevant part, 794 F.2d

527 (9th Cir. 1986). Rather, supervisory status hinges on "the significance of his judgment and directions." *Ibid.* (quoting *NLRB* v. *Wilson-Crissman Cadillac*, 659 F.2d 728, 729 (6th Cir. 1981)). See, *e.g.*, *Hydro Conduit Corp.*, 254 N.L.R.B. 433, 437 (1981) (employee did not exercise "independent judgment" because he did not exercise "any significant discretion" with respect to supervisory powers); *Capital Transit Co.*, 114 N.L.R.B. 617, 618-619 (1955) (employee not supervisor when "discretion accompanying the duties [is] so circumscribed by limitations * * * as to negate the use of independent judgment").

Applying that principle to a various employment contexts outside of the health care field, the Board has concluded that employees who, based on technical skill[5]

[5] See, *e.g.*, *Arlington Elec., Inc.*, 332 N.L.R.B. No. 74, 2000 WL 1614380, *2 (Oct. 24, 2000) (electrician did not exercise "independent judgment" where he "provided direction and guidance to other employees based on his experience and craft skill and pursuant to [a statutory supervisor's] project plans"); *Mississippi Power & Light Co.*, 328 N.L.R.B. No. 146, 1999 WL 551405, *14-15 (July 26, 1999) (distribution dispatchers whose "performance of their own job entails the exercise of special knowledge or expertise" did not exercise "independent judgment" in directing field employees pursuant to "complex schemata"); *Chevron Shipping Co.*, 317 N.L.R.B. 379, 381-382 (1995) (licensed ship officers not supervisors where "their authority to direct the work of the crew is based on their greater technical expertise and experience" and "their use of independent judgment and discretion is circumscribed by the master's standing orders, and the Operating Regulations," which "delineate[] in great detail" the duties of both licensed and unlicensed crew members); *Lockheed Aircraft Corp.*, 87 N.L.R.B. 40, 41-42 (1949) (leadmen not supervisors where they "interpret" shop orders and blueprints for members of their work groups); see also *Westinghouse Elec. Corp.* v. *NLRB*, 424 F.2d 1151, 1156 (7th Cir.) (upholding Board's finding that directions given by field engineers to casual laborers in accordance with design plans not

or experience,[6] exercise limited discretion to direct other employees in accordance with employer-specified standards (as expressed in blue-prints, established work procedures, and the like) do not exercise the "independent judgment" that triggers supervisory status. For example, in *Graphics Typography, Inc.*, the Board decided that experienced employees in a lithography shop did not exercise "independent judgment contemplated by Section 2(11)." 217 N.L.R.B. at 1053. Although the employees used "judgment in advising less experienced employees how to deal with specific work problems or how best to do a job," that

supervisory where "such communications are necessary incidents of the application of [the field engineers'] technical know-how"), cert. denied, 400 U.S. 831 (1970).

[6] See, *e.g.*, *Somerset Welding & Steel, Inc.*, 291 N.L.R.B. 913, 914 (1988) (employees who have "responsibility to direct the work" "based on their higher level of skill and greater seniority" "do not exercise independent judgment" when they "mak[e] sure [assignments] are completed to predetermined specifications"); *John Cuneo of Okla., Inc.*, 238 N.L.R.B. 1438, 1439 (1978) (experienced employee in charge of sprinkler installation crew does not exercise "independent judgment" in directing employees where blueprints are "generally explicit" and applicable industry booklet "regulates significant aspects of sprinkler installation"), enforced mem., 106 L.R.R.M. (BNA) 3077 (10th Cir. 1980) (Table); *In re Atlanta Coca-Cola Bottling Co.*, 83 N.L.R.B. 187, 189 (1949) (direction by driver-salesmen of activities of helper is "routine in character" and "does not exceed that of a skilled craftsman with respect to a single helper working under his direction"); see also *NLRB* v. *Quincy Steel Casting Co.*, 200 F.2d 293, 295 (1st Cir. 1952) (upholding Board's finding that employee who "had charge of [hot metal] pouring operation, a task of coordination, telling a fellow molder when to start and when to stop pouring" was not a supervisor even though the job "requires the exercise of some judgment" because "any of the skilled molders in the room was competent to handle the job" and the "operation is more or less routine").

direction "involved a technical judgment based on skill and experience" and did not "extend[] in any significant manner beyond standardized operating procedures." *Ibid.*[7]

The Board has applied the same principle to professional employees in a variety of fields. For example, in *Golden West Broadcasters-KTLA*, 215 N.L.R.B. 760, 762 & n.4 (1974), the Board found that "directors" at remote television broadcasts were not supervisors. The Board explained that supervisory status "turns not only

[7] When, however, an employee is vested with significant discretion to direct other employees within only general confines set by the employer's instructions, the Board has found that the employee exercises "independent judgment" that triggers supervisory status. See, *e.g.*, *Atlanta Newspapers*, 306 N.L.R.B. 751, 756 (1992) (men-in-charge, who "oversee the operation of the press," found to be supervisors because, "[a]lthough they have a checklist of operations to perform," they have "significant authority over and responsibility for their crews with respect to the assignment of work to them and their direction in carrying out their tasks"); *Essex Wire Corp.*, 188 N.L.R.B. 397, 403 (1971) (employee who was given written instructions "as to which operations were to be performed and for how long" found to be a supervisor because he "could and did exercise discretion and judgment" in "switch[ing workers] between operations, decid[ing] whether he had too many for his needs, [and] transfer[ing] them to the night-shift foreman for reassignment"); *Angelo C. Scavullo*, 109 N.L.R.B. 1327, 1332 (1954) (employee who received "general guidance" from route sheets prepared by management found to be supervisor because "even with the route sheets to guide him he must still exercise considerable discretion and judgment in giving" directions to other employees). See also *Health Care & Retirement Corp.*, 328 N.L.R.B. No. 156, 1999 WL 562096, *2 (July 27, 1999) (nurses found to be supervisors because they "exercise independent judgment when disciplining [aides], for example, by determining what category to classify a given infraction of the Employer's rules and to take the appropriate action").

on whether [an employee has] the authority, in the interest of the employer, inter alia, responsibly to direct other employees, *but also on the nature and extent of that authority.*" *Id.* at 762 n.4 (emphasis added). Thus, "an employee with special expertise or training who directs or instructs another in the proper performance of his work for which the former is professionally responsible is not thereby rendered a supervisor." *Ibid.* "This is so," the Board explained, "even when the more senior or more expert employee exercises some independent discretion where, as here, such discretion is based upon special competence or upon specific articulated employer policies." *Ibid.*[8]

[8] See also *International Ctr. for Integrative Studies/The Door*, 297 N.L.R.B. 601, 602 & n.7 (1990) (doctor not supervisor because she at most "engaged in the routine direction of employees," and "the routine direction of employees based on a higher level of skill or experience is not evidence of supervisory status"); *Washington Post Co.*, 254 N.L.R.B. 168, 204 (1981) (night metro editor not supervisor where he exercised "limited discretion" in assigning stories to reporters consistent with "the [e]mployer's standards for preparing a quality newspaper"); *General Dynamics Corp.*, 213 N.L.R.B. 851, 858-859 (1974) (employees who "exercise a certain amount of discretion in assigning work" not supervisors because discretion is "within the parameters set by the utilization of systems engineering," "exercised in a professional sense," and "directly related to a professional responsibility for the quality of work performed on the projects to which they are assigned"); *Skidmore, Owings & Merrill*, 192 N.L.R.B. 920, 921 (1971) (project manager and job captains at architecture firm who have "some discretion in assigning work and are professionally responsible for the quality of work performed on a project to which they are assigned" are not supervisors but "merely provide professional direction and coordination for other professional employees"); *National Broad. Co.*, 160 N.L.R.B. 1440, 1441-1442 (1966) (deskmen not supervisors because they exercise "only such judgment" and execute "only such tasks as appropriately fall within the scope of the newswriting craft or profession" and their assignment and direction is "but a part of the group or team effort required for the production of up-to-the-minute, professionally prepared news programs in keeping with the standards maintained by the Employer").

As we have noted, see pp. 15-16, *supra*, after *HCR*, the Board decided to apply the same principle to the health care industry. Thus, the Board has recognized that a nurse who articulates the meaning of an established health care routine to an aide—like a technician who gives directions on the basis of a reading of a wiring diagram or blueprint—may well exercise some degree of judgment. Without more, however, a nurse delegated such limited authority over other employees is not exercising the "independent judgment" that triggers supervisory status but is making only a routine professional or technical judgment and giving directions based on that judgment. See *Northern Mont. Health Care Ctr.*, 324 N.L.R.B. 752, 753 (1997) (demonstrating to an aide the proper way to perform a procedure is "the exercise of the [nurse's] greater skill and experience in helping a less skilled employee perform her job correctly"), enforced in relevant part, 178 F.3d 1089 (9th Cir. 1999); *Rest Haven Living Ctr.*, 322 N.L.R.B. 210, 211 (1996) (LPNs do not exercise independent judgment because directives to aides are "narrowly circumscribed" and involve "routine directions to lesser skilled employees consistent with established employer policies"); *Nymed*, 320 N.L.R.B. at 807, 810-812 & nn.9-11 ("narrowly circumscribed" assignment and direction of aides does not involve independent judgment when based on detailed individual health care plans).[9]

[9] In some decisions applying the principle discussed in the text above, the Board appears to suggest that the principle also reflects an interpretation of Section 2(11)'s "responsibly to direct" lan-

B. The Board's Interpretation Is Consistent With The Text Of Section 2(11)

The Board's understanding of independent judgment is supported by the text of Section 2(11). The statutory language makes clear that an employee may exercise supervisory authority that requires the use of some degree of judgment without being a supervisor. Under Section 2(11), an employee is not a supervisor merely because he has authority to assign, responsibly to direct, or to exercise one of the other listed supervisory

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guage. See, *e.g.*, *Adco Elec. Inc.*, 307 N.L.R.B. 1113, 1120 (1992) ("Exercise of the authority which derives from a worker's status as a skilled craftsman does not confer supervisory status because that authority is not the type contemplated in the statutory definition. * * * * '[I]t is not the authority responsibly to direct other employees which flows from management and tends to identify or associate a worker with management.'") (citation omitted), enforced, 6 F.3d 1110 (5th Cir. 1993); *Sears, Roebuck & Co.*, 292 N.L.R.B. 753, 754-755 (1989) (employee who assigns work is not engaged in either "responsible direction" or "the exercise of independent judgment" because he is "merely an experienced employee who knows which employee can better operate certain equipment"); *Southern Bleachery & Print Works, Inc.*, 115 N.L.R.B. 787, 791, 792-793 (1956) (employee does not exercise "the authority responsibly to direct other employees which flows from management" where employer's instructions merely "codify the control * * * customarily exercised by any skilled craftsmen over their helpers and apprentices"), further decision, 118 N.L.R.B. 299 (1957), enforced, 257 F.2d 235 (4th Cir. 1958), cert. denied, 359 U.S. 911 (1959). This case, however, presents only the question of the proper interpretation of "independent judgment," not the question of the correct interpretation of "responsibly to direct." See Pet. App. 52a-53a (relying on "traditional analysis" of independent judgment as described in *Providence Hosp.*, 320 N.L.R.B. at 717); Pet. App. 17a-19a (rejecting Board's interpretation of "independent judgment"); Pet. i (seeking this Court's review of proper interpretation of "independent judgment").

functions with respect to other employees. An employee is a supervisor only if his exercise of that authority is both "not of a merely routine or clerical nature" and "requires the use of independent judgment." 29 U.S.C. 152(11).

If Congress had intended to class as a supervisor any employee who directs other employees in a non-ministerial way, it could simply have provided that supervisory action requires the exercise of "judgment." The statute's use instead of both the limiting phrase "not of a merely routine or clerical nature" and the adjective "independent" suggests that, in order to be considered a supervisor, an employee must exercise supervisory authority using judgment that entails a significant amount of discretion.

That suggestion is reinforced by the meaning of the terms "routine" and "independent." At the time that Section 2(11) was enacted, "routine" meant "[o]f the nature of routine; performed, or occurring, regularly." *Webster's New International Dictionary* 2176 (2d ed. 1934); see also *ibid.* (defining the noun "routine" to mean "[a] round, as of business, amusement, or occupation, daily or frequently pursued; esp., a regular or customary course of business or official duties" (def. 1)). A leading legal definition of "independent," on the other hand, was "not subject to control, restriction, modification or limitation from a given outside source." *Black's Law Dictionary* 950 (3d ed. 1933). See also *Webster's New International Dictionary* at 1262 (including, among the definitions of "independent," "[n]ot contingent or conditioned" (def. 1b) and "unconstrained" (def. 5)). Thus, the text of Section 2(11) suggests, consistent with the Board's view, that the "independent judgment" that triggers supervisory status is judgment beyond that involved in carrying out regular or custom-

ary activities and which is not controlled or significantly constrained by outside sources, such as employer-specified standards.

C. The Board's Interpretation Furthers Section 2(11)'s Purpose

The Board's interpretation of "independent judgment" not only comports with the language of Section 2(11) but also advances the purpose of that provision. As we explain below, the exclusion of supervisors from NLRA coverage was designed to ensure that management could rely on the undivided loyalty of its representatives, but Congress intended to preserve the Act's protections for those employees with minor supervisory responsibilities who do not exercise true managerial power. Indeed, in enacting Section 2(11), Congress essentially adopted the definition of supervisor that the Board had employed in administering the original NLRA, known as the Wagner Act. Under that definition, as under its current practice, the Board did not class as supervisors employees who, in addition to doing their own work, provided limited direction for others based on technical skills or employer-specified standards.

1. The Wagner Act gave "employee[s]" the right to organize and did not expressly exclude supervisors from its coverage. See Act of July 5, 1935, ch. 372, § 2(3), 49 Stat. 450; *HCR*, 511 U.S. at 573. As a consequence, the Board wavered on the question whether supervisors could organize until it ultimately decided that they could in *Packard Motor Car Co.*, 61 N.L.R.B. 4, further decision, 64 N.L.R.B. 1212 (1945), enforced, 157 F.2d 80 (6th Cir. 1946), aff'd, 330 U.S. 485 (1947). See *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 277 (1974). Early in its administration of the Wagner Act,

however, the Board determined that, whether or not supervisors could organize in their own bargaining units, they could not be included in units composed of ordinary employees. See *Third Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1938*, at 180 (1939).

The Board therefore adopted the following definition in order to identify supervisory employees:

> [E]mployees who supervise or direct the work of employees [in the bargaining unit], and who have authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of such employees, or whose official recommendations concerning such action are accorded effective weight.

Douglas Aircraft Co., 50 N.L.R.B. 784, 787 (1943). See *Eighth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1943*, at 57 & n.57 (1944) (describing *Douglas Aircraft* as setting forth "a general standard definition of supervisory employees").

Under that definition, the Board consistently found that employees were not supervisors merely because, in addition to doing their own work, they exercised technical judgment to direct the work of less-skilled coworkers. For example, in *Victor Chemical Works*, 52 N.L.R.B. 194, 199 (1943), the Board found that "key men" were not supervisors, even though they were "experienced employees" who spent part of their working time "instructing or directing one to six helpers, or less experienced workers" who had been "directed to rely on the judgment of key men in decisions relating to the treatment of the product in their machines." The Board concluded that "the relationship between key men and employees with

whom they work" was "the relation between a skilled worker and his helpers or between an instructor and an inexperienced employee, whom he may be teaching." *Ibid.*[10]

The Board also found that employees were not supervisors when they directed other employees pursuant to employer-specified instructions or standards. For example, in *Wilson & Co.*, 61 N.L.R.B. 105 (1945), the Board found that certain "steady-time checkers" were neither supervisors nor "part of management" where, in accordance with "loading slips made out by the foreman," they "direct[ed] the manner in which the cars are loaded" by employees known as "car loaders." *Id.* at 106-107. Similarly, in *General Chemical Co.*, 64

[10] See also, *e.g.*, *New Jersey Worsted Mills*, 63 N.L.R.B. 455, 457 (1945) (finding "group leaders" in a wool mill not supervisors but rather "experienced workers" who spent "part of their time checking and assisting fellow employees placed under their direction"); *Bunting Brass & Bronze Co.*, 58 N.L.R.B. 618, 619-620 (1944) (finding "set-up men" and "linemen" not supervisors where they directed the work of less-skilled machine operators and assured that the work was done correctly), aff'd on further consideration, 63 N.L.R.B. 818 (1945); *Federal Shipbuilding & Drydock Co.*, 55 N.L.R.B. 1438, 1439 (1944) (fact that "the chargemen direct and guide the work of the draftsmen and drafting room technicians in their sections, does not, of itself, elevate them to such supervisory rank as to warrant their exclusion from the unit"); *Boardman Co.*, 55 N.L.R.B. 105, 108 (1944) (finding employees who "work with and direct small crews" not supervisors where the directing employees' authority derived from "superior experience [that] enables them to guide others in the performance of their work"); *Duval Tex. Sulphur Co.*, 53 N.L.R.B. 1387, 1390-1391 (1943) (chief electrician, motor mechanic, plant engineers and drillers who "work with helpers, and perforce direct and guide the work of their helpers" are not supervisors but "occupy positions comparable to that of master mechanics or journeymen in their respective crafts").

N.L.R.B. 357 (1945), the Board found that skilled laboratory employees, who were "to see to it that optimum operating conditions prevail," were not supervisors on the ground that they also may "direct the work of the production employees"; rather, the laboratory employees were "technical experts of a type frequently included in bargaining units." *Id.* at 361-362.[11]

The Board's decisions also indicated that whether employees were excludable from bargaining units of rank-and-file employees depended upon whether their work was "of a routine nature, not involving the exercise of managerial discretion" (*Whitney Blake Co.*, 66 N.L.R.B. 491, 494 (1946)) or instead required "a high degree of independent judgment" (*Commonwealth Edison Co.*, 60 N.L.R.B. 1365, 1368-1369 (1945)). See also *Phillips Petroleum Co.*, 61 N.L.R.B. 806, 812 (1945) (supervisory employee exercised "a considerable degree of judgment and discretion in supervising the work of other employees").

2. Section 2(11) was added to the NLRA as part of the Labor Management Relations Act of 1947 or Taft-Hartley Act, ch. 120, § 2(11), 61 Stat. 138, in order to

[11] See also *Endicott Johnson Corp.*, 67 N.L.R.B. 1342, 1347 (1946) (employees who "direct from one to six employees" and whose "duties are to keep production moving on schedule and to inspect and control the quality of work"); *Bethlehem-Sparrows Point Shipyard, Inc.*, 65 N.L.R.B. 284, 286 (1946) (employees in shipyard who "coordinate and expedite the outfitting work on the ships, consulting the various craft foremen in order to insure that the work will progress smoothly and rapidly"); *Richards Chem. Works, Inc.*, 65 N.L.R.B. 14, 16 (1945) (employees responsible for "see[ing] that the work is gotten out" under daily instructions issued by the production manager); *Pittsburgh Equitable Meter Co.*, 61 N.L.R.B. 880, 882 (1945) (group leaders who, working under the foremen's direction, "instruct and assign material to men who work under them in groups from 1 to 40").

reverse the *Packard* rule that supervisory employees had a protected right to organize. See *HCR*, 511 U.S. at 573; *Bell Aerospace*, 416 U.S. at 279. As explained by the Senate Committee on Labor and Public Welfare, which crafted the language that, with slight modification, became Section 2(11), Congress's purpose was to ensure an employer the undivided loyalty of its representatives, who, if they were afforded a protected right to join or form unions, might be subject to control by the same union as the employees they were supposed to be supervising on the employer's behalf. S. Rep. No. 105, 80th Cong., 1st Sess. Pt. 1, at 4-5 (1947).

At the same time, however, Congress wanted to assure that its definition of "supervisor" would not embrace individuals whom the Board had generally found to be employees under the Wagner Act, even though they exercised some supervisory authority. Thus, the Senate Committee explained:

> In drawing an amendment to meet this situation, the committee has not been unmindful of the fact that certain employees with minor supervisory duties have problems which may justify their inclusion in that act. It has therefore distinguished between straw bosses, leadmen, set-up men, and other minor supervisory employees, on the one hand, and the supervisor vested with such genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action.

S. Rep. No. 105, *supra*, at 4.

To preserve its intended distinction between "minor supervisory employees" and persons vested with

"genuine management prerogatives," the Senate Committee defined "supervisor" as:

> [A]ny individual having authority, in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or to adjust their grievances, or effectively to recommend such action if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

H.R. 3020, 80th Cong., 1st Sess. Tit. I, § 2(11) (1947) (as passed by Senate) (*reprinted in Bell Aerospace*, 416 U.S. at 280 n.10).[12] That language signaled Congress's

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[12] The Senate definition of "supervisor" prevailed over a different definition passed by the House, which would have categorized as supervisors a broader spectrum of employees, including leadmen and other minor supervisors. See *Bell Aerospace*, 416 U.S. at 283. The Senate definition was narrower in this respect because, unlike the House definition, the Senate definition applied the "independent judgment" limitation to the whole range of supervisory functions. The House bill defined "supervisor" to include, *inter alia*, "any individual * * * who has authority, in the interest of the employer * * * to hire, transfer, suspend, lay off, recall, promote, demote, discharge, assign, reward, or discipline any individuals employed by the employer, or to adjust their grievances, or to effectively recommend any such action." H.R. 3020, 80th Cong., 1st Sess. Tit. I, § 2(12)(A)(i) (1947) (as passed by House) (House Bill) (*reprinted in Bell Aerospace*, 416 U.S. at 279 n.9). That provision, unlike the Senate definition, did not contain an "independent judgment" limitation. Although another provision of the House definition contained an "independent judgment" limitation, that provision concerned only employees having specified authority in regard to fixing wages earned by other employees. House Bill § 2(12)(A)(ii) (*reprinted in* 416 U.S. at 279 n.9). Thus, Congress used the independent judgment requirement to impose the dis-

intent essentially to incorporate the approach used by the Board to determine supervisory status under the Wagner Act, because it was an amalgam of the Board's *Douglas Aircraft* test,[13] and the "routine in nature"/"independent judgment" principle articulated in other Board bargaining-unit decisions. See pp. 25-27, *supra*. Indeed, the Senate Committee underscored that, in fashioning its definition of supervisor, it "adopted the test which the Board itself has made in numerous cases when it has permitted certain categories of supervisory employees to be included in the same bargaining unit with the rank and file." S. Rep. No. 105, *supra*, at 4.[14] On the Senate floor, Senator Taft, the sponsor of the Senate bill, reiterated that "[t]he definition in the bill is that which has been used by the National Labor Relations Board for the past 4 or 5 years." 93 Cong. Rec. 4678 (1947).

The Senate Committee's definition of "supervisor" was altered only in one respect before enactment by Congress. On the Senate floor, Senator Flanders offered an amendment to add the phrase "or responsibly to direct them" immediately after the phrase "other

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tinction that it intended to draw between minor supervisors and true representatives of management.

[13] The Senate Committee's definition listed several additional indicia of supervisory authority (such as authority to "transfer" and "recall") that were encompassed within *Douglas Aircraft*'s catch-all category of authority to "otherwise effect changes in the status" of other employees. See p. 25, *supra*.

[14] The Senate Committee report cited with approval the Board decisions discussed in note 11, *supra*, which illustrate the principle that the direction of other employees in conformity with the employer's instructions does not make the directing employee a supervisor, even if it requires him to use some judgment. S. Rep. No. 105, *supra*, at 4.

employees." See 93 Cong. Rec. 4677 (1947). Senator Flanders explained that the amendment brought within the supervisory category persons "*above* the grade of 'straw bosses, lead men, set-up men, and other minor supervisory employees,' as enumerated in the [Senate Committee] report," who, although lacking authority to make "effective" changes in the status of subordinate employees, are vested with substantial "managerial duties." *Id.* at 4677-4678 (emphasis added). Senator Taft immediately accepted the Flanders amendment, which in his view made no significant change to the definition of supervisor drafted by the Senate Committee, and the amendment passed. See *id.* at 4678.[15]

The Board's interpretation of independent judgment furthers the purpose of Section 2(11), as described above, in two related ways: It gives effect to Congress's intent to preserve the protections of the Act for employees who have only "minor supervisory duties" while excluding from coverage those who exercise "genuine management prerogatives." S. Rep. No. 105, *supra*, at 4. And it comports with Congress's intent to

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[15] The Senate's definition of supervisor was adopted by the House-Senate conference committee. H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 4 (1947). The Conference Report explained that "[t]he Senate amendment confined the definition of 'supervisor' to individuals generally regarded as foremen and persons of like or higher rank. The conference agreement, in the definition of 'supervisor,' limits such term to those individuals treated as supervisors under the Senate amendment." *Id.* at 35. In reporting the conference committee's action to the Senate, Senator Taft likewise explained that "[t]he Senate amendment, which the conference ultimately adopted, is limited to bona fide supervisors. * * * The Senate amendment confined the definition of supervisor to individuals generally regarded as foremen and employees of like or higher rank." 93 Cong. Rec. 6442 (1947). See generally *Bell Aerospace*, 416 U.S. at 282.

incorporate the definition of supervisor that the Board used in administering the Wagner Act, which excluded from supervisory status employees who provided limited direction for others based on technical skills or employer-specified standards.

D. The Board's Interpretation Properly Accommodates The Act's Coverage Of "Professional Employees"

The Board's interpretation of "independent judgment" also harmonizes Section 2(11)'s exclusion of supervisors with Section 2(12), which includes "professional employees" within the coverage of the Act. See *NLRB* v. *Hilliard Dev. Corp.*, 187 F.3d 133, 142-143 (1st Cir. 1999). Under the terms of Section 2(12), professional employees, by definition, engage in "the consistent exercise of discretion and judgment." 29 U.S.C. 152(12)(a)(ii). See *Leedom* v. *Kyne*, 358 U.S. 184 (1958). The Act's simultaneous exclusion of supervisors and inclusion of professional employees indicates that there is a distinction between the exercise of "independent judgment" and the exercise of "discretion and judgment." By giving effect to that distinction, the Board's interpretation of "independent judgment" preserves the coverage of professional employees mandated by the Act.

When Congress provided coverage to professional employees, it was aware that professionals work with assistants. H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 36 (1947) (definition of "professional employee" covers "such persons as legal, engineering, scientific and medical personnel together with their junior professional assistants"). Congress therefore could not have intended that this fact would prevent the coverage of "professional groups such as * * * nurses" that Congress provided for in Section 2(12). S. Rep. No. 105,

supra, at 19. See also *NLRB* v. *Res-Care, Inc.*, 705 F.2d 1461, 1465 (7th Cir. 1983).

Congress's intent to cover nurses and other professionals would be frustrated, however, if "the consistent exercise of discretion and judgment" under Section 2(12) also constitutes "the use of independent judgment" under Section 2(11), because many professional employees (such as lawyers, doctors, and nurses) customarily give judgment-based direction to the less-skilled employees with whom they work. In order to effectuate Congress's intention to cover professional employees, the Board's interpretation clarifies that the exercise of Section 2(11) "independent judgment" is not synonymous with the exercise of Section 2(12) "discretion and judgment." Rather, a professional does not exercise "independent judgment" to the extent that her judgment is "indistinguishable from the professional judgment exercised by all [professionals in the same field]." *Providence Hosp.*, 320 N.L.R.B. at 729-730.

The Board's interpretation is consistent with its traditional view, as described by this Court, that "employees whose decisionmaking is limited to the routine discharge of professional duties in projects to which they have been assigned cannot be excluded from coverage even if union membership arguably may involve some divided loyalty." *NLRB* v. *Yeshiva Univ.*, 444 U.S. 672, 690 (1980). Rather, "[o]nly if an employee's activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management." *Ibid.* Cf., *e.g.*, cases cited in note 8, *supra*. See also *HCR*, 511 U.S. at 583 (noting that, outside the health-care industry, the Board has drawn "a distinction between authority arising from professional knowledge and authority encompassing front-line management pre-

rogatives"). By interpreting "independent judgment" to reflect that distinction, the Board properly avoids reading Section 2(11) in a way that "would swallow up and displace almost the entirety of the professional-employee inclusion." *NLRB* v. *Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 185 (1981).

E. The Court Of Appeals Erred In Substituting Its Own Interpretation Of "Independent Judgment" For That Of The Board

The Board's interpretation of "independent judgment," and its application of that interpretation to various "different categories of employees," *HCR*, 511 U.S. at 579, is a classic illustration of "the Board's special function of applying the general provisions of the Act to the complexities of industrial life." *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 236 (1963). In fulfilling that function, the Board is entitled to "considerable deference." See *Curtin Matheson*, 494 U.S. at 786; see also *Marine Eng'rs Beneficial Ass'n* v. *Interlake S.S. Co.*, 370 U.S. 173, 179 n.6 (1962) (Board has been afforded "a large measure of informed discretion" in determining when the "authority 'responsibly to direct' the work of others" requires a finding of supervisory status) (quoting *NLRB* v. *Swift & Co.*, 292 F.2d 561, 563 (1st Cir. 1961)). Because, as we have demonstrated, the Board's interpretation of "independent judgment" is "rational and consistent" with the Act, the Sixth Circuit erred in substituting its own view for the Board's. See *Auciello Iron Works*, 517 U.S. at 787-788; *Curtin Matheson*, 494 U.S. at 796; *Fall River Dyeing & Finishing Corp.*, 482 U.S. at 42.

As the Sixth Circuit has previously explained, its refusal to defer to the Board's interpretation is based in

significant part on its belief that the Board's interpretation of "independent judgment" replicates the same "false dichotomy" that this Court rejected in *HCR* between "acts taken in connection with patient care and acts taken in the interest of the employer." *Integrated Health Servs.* v. *NLRB*, 191 F.3d 703, 711 (6th Cir. 1999) (quoting *HCR*, 511 U.S. at 577). The Sixth Circuit's view, however, is based on an incorrect reading of *HCR*.

As we have discussed at p. 15, *supra*, *HCR* rejected only the Board's "in the interest of the employer" test for determining the supervisory status of nurses. 511 U.S. at 574, 576. The Court made quite clear the limited reach of its holding: "our decision casts no doubt on Board or court decisions interpreting parts of § 2(11) other than the specific phrase 'in the interest of the employer.'" *Id.* at 583. Indeed, the Court pointed out that the statutory phrase "independent judgment" is "ambiguous" and, therefore, that the Board is entitled to "ample room" in applying it. *Id.* at 579. The Court also recognized (without any indication of disapproval) that, in various industries, the Board has applied "a distinction between authority arising from professional knowledge and authority encompassing front-line management prerogatives" in deciding whether employees exercise "independent" judgment. *Id.* at 583.

The Court in *HCR* did not hold that the Board is foreclosed from fashioning an interpretation of Section 2(11) that effectuates the statutory policy of ensuring coverage for "minor supervisory employees," such as leadmen, and for professional employees. Rather, the Court held only that the Board's "in the interest of the employer" test was an invalid means of effectuating that policy, because it was inconsistent with "the ordinary meaning of the phrase 'in the interest of the

employer'" and with the Court's precedents. 511 U.S. at 578. Because, as we have shown, the Board's interpretation of "independent judgment" is entirely consistent with the statutory text[16] and precedent,[17] the court of appeals erred in rejecting the Board's interpretation.

II. THE BOARD'S RULE REGARDING THE ALLOCATION OF THE BURDEN OF PROVING SUPERVISORY STATUS IS REASONABLE AND PERMISSIBLE UNDER THE ACT

This case also involves the question whether the Board permissibly requires the party who alleges that an employee is excluded from the rights and protections afforded by the Act as a supervisor to bear the burden of proving the individual's supervisory status. See, *e.g.*, *St. Alphonsus Hosp.*, 261 N.L.R.B. 620, 624 (1982),

[16] The court of appeals has repeatedly stated that "[i]t is perfectly obvious that the kind of judgment exercised by registered nurses in directing . . . nurse's aides in the care of patients * * * is not 'merely routine.'" *Integrated Health Servs.*, 191 F.3d at 711 (quoting *Beverly Cal. Corp.* v. *NLRB*, 970 F.2d 1548, 1553 (6th Cir. 1992)). Accord *Mid-America Care Found.* v. *NLRB*, 148 F.3d 638, 641 (6th Cir. 1998); *Grancare, Inc.* v. *NLRB*, 137 F.3d 372, 376 (6th Cir. 1998); *Caremore, Inc.* v. *NLRB*, 129 F.3d 365, 370 (6th Cir. 1997). That conclusion neither follows from the plain meaning of "routine" nor takes account of the statute's use of the additional "ambiguous" term "independent judgment." See p. 23, *supra*; *HCR*, 511 U.S. at 579.

[17] In *HCR*, the Court found the Board's reliance on the phrase "in the interest of the employer" to be inconsistent with the Court's reasoning in the *Packard* decision, in a respect that Congress did not change when it altered the *Packard* rule. 511 U.S. at 578. As we have shown, see pp. 27-31, *supra*, in reacting to *Packard*, Congress also did not disturb, but instead endorsed, the Board's established practice of affording the Act's protections to leadmen and other minor supervisors.

enforced mem., 703 F.2d 577 (9th Cir. 1983) (Table). The court of appeals rejected the Board's rule and held instead that the Board "has the burden of proving that employees are not supervisors." Pet. App. 15a (quoting *Grancare, Inc.* v. *NLRB*, 137 F.3d 372, 375 (6th Cir. 1998)). Because the Board's rule regarding the allocation of the burden of proving supervisory status is reasonable and permissible under the Act, the court of appeals should have deferred to it. See *NLRB* v. *Transportation Mgmt. Corp.*, 462 U.S. 393, 402-403 (1983) (upholding Board's allocation of burden of proof in another context).

A. The Board's Rule Accords With Principles Of Statutory Construction And Furthers The Purpose Behind The Act's Exemption Of Supervisors

The text of the Act does not in terms supply a rule that allocates the burden of proving supervisory status. In that circumstance, the Board has discretion to formulate an allocation rule, and the rule is entitled to judicial deference if it is reasonable and permissible under the Act. See *Transportation Mgmt. Corp.*, 462 U.S. at 403. Exercising its discretion, the Board has developed a rule that applies regardless whether the employer, the union, or the Board's General Counsel is the party asserting a claim of supervisory status. Under the Board's rule, for example, an employer must carry the burden when it defends against an unfair labor practice complaint by claiming that the employee against whom it allegedly discriminated is a supervisor. See, *e.g.*, *Ahrens Aircraft, Inc.*, 259 N.L.R.B. 839, 842 (1981), enforced, 703 F.2d 23 (1st Cir. 1983). Likewise, a union must carry the burden when it challenges a ballot by claiming that the voter who cast the ballot is a supervisor. See, *e.g.*, *Bowne of Houston, Inc.*, 280

N.L.R.B. 1222, 1223 (1986). And the General Counsel must carry the burden when he alleges an individual's supervisory status as part of his case. See, *e.g.*, *Hydro Conduit Corp.*, 254 N.L.R.B. 433, 441 (1981). Furthermore, the Board applies the same rule to all industries subject to its jurisdiction. See, *e.g.*, *Commercial Movers, Inc.*, 240 N.L.R.B. 288, 290 (1979); *Thayer Dairy Co.*, 233 N.L.R.B. 1383, 1387 (1977).

The Board's rule is reasonable and permissible under the Act. The text of the Act broadly defines "employee" to mean "any employee," but excepts from that coverage "any individual employed as a supervisor." 29 U.S.C. 152(3). See *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 891 (1984). As this Court has explained, "the general rule of statutory construction [is] that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits." *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 44-45 (1948) (citing *Javierre* v. *Central Altagracia*, 217 U.S. 502, 507-508 (1910)). See also *Raleigh* v. *Illinois Dep't of Revenue*, 120 S. Ct. 1951, 1955 (2000) ("one who asserts a claim is entitled to the burden of proof that normally comes with it"); *Mitchell* v. *Kentucky Fin. Co.*, 359 U.S. 290, 291 (1959) (stating that "[t]he burden is, of course, upon respondents to establish that they are entitled to the benefit of the [statutory] exemption, since coverage apart from the exemption is admitted").

Applying the principle reflected in those cases to the NLRA, this Court has cautioned that "administrators and reviewing courts must take care to assure that exemptions from NLRA coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach." *Holly Farms Corp.* v. *NLRB*, 517 U.S. 392, 399 (1996). The Board's rule, which places the burden of proof on the party claiming that individuals at issue are exempt from coverage as supervisors, adheres to that admonition.

The Board's rule also furthers the specific purpose behind the Act's exemption for supervisors. As we have described in detail, see pp. 27-31, *supra*, Congress intended that the Act's exclusion of supervisors from coverage would be limited, that the "employees [thereby] excluded from the coverage of the act be truly supervisory." S. Rep. No. 105, *supra*, at 19. See also *Bell Aerospace*, 416 U.S. at 280-281, 283. The Board's rule effectuates that intention by placing the burden of proving supervisory status upon those invoking the exemption. "In contrast, placing the burden of proof on the Board[, as the court of appeals did here,] presumes that all employees simply asserted by employers to be supervisors are exempt from the Act's coverage until proven otherwise." *Grancare*, 137 F.3d at 378 (Moore, J., concurring in the judgment). That approach would undermine Congress's purpose to preserve the protections of the Act for all employees except those who possess "genuine management prerogatives." S. Rep. No. 105, *supra*, at 4.

B. Practical Considerations Also Support The Board's Rule

The Board's allocation rule also makes eminent sense because of the forum in which supervisory status under the Act is frequently litigated. Often, as in this case, the issue whether particular workers are supervisors arises in a representation proceeding rather than an unfair labor practice proceeding.[18] Indeed, the Act

[18] A representation proceeding is a proceeding conducted by the Board in response to a petition requesting that the Board direct an election to determine whether a particular union is the representa-

contemplates that such factual questions concerning the scope and composition of the appropriate bargaining unit will be resolved in representation proceedings, and it therefore provides for administrative hearings to resolve issues raised by representation petitions. 29 U.S.C. 159(c)(1). See *Barre-Nat'l, Inc.*, 316 N.L.R.B. 877, 878 (1995). See generally *Boire* v. *Greyhound Corp.*, 376 U.S. 473 (1964); *AFL* v. *NLRB*, 308 U.S. 401 (1940).

Neither the Board nor its General Counsel has an advocacy role in representation proceedings. *Ohio Masonic Home, Inc.*, 295 N.L.R.B. 390, 393 n.7 (1989). Because the Board is not a litigating party to those proceedings, it is inappropriate to place an evidentiary burden in those proceedings on the Board. *Ibid.*; *Grancare*, 137 F.3d at 379 (concurring opinion). See also 29 C.F.R. 101.20(c). Rather, it is reasonable for the Board to place the burden of proving an employee's supervisory status on whichever actual party to the proceeding (the employer or the union) is asserting the claim that the employee is a supervisor.

An employer who receives an adverse ruling from the Board on a supervisory claim may (as respondent did here) precipitate an unfair labor practice proceeding by refusing to bargain with the certified union. See 29 U.S.C. 158(a)(5).[19] Although the General Counsel is a

tive of a particular bargaining unit of employees. See 29 U.S.C. 159(c).

[19] Although there is no judicial review of the Board's determination in a representation proceeding, *AFL*, 308 U.S. at 411, there is judicial review of a final order of the Board in an unfair labor practice proceeding. 29 U.S.C. 160(f). Congress's purpose in establishing this indirect method by which employers may challenge Board representation decisions in the courts was to forestall the delays that it feared would result if representation proceedings

party to an unfair labor practice proceeding, that circumstance does not warrant—let alone compel—a rule requiring the General Counsel to bear the burden of proving in that proceeding that disputed individuals in the bargaining unit represented by a certified union are not supervisors. The General Counsel bears the burden of proving only the elements of an unfair labor practice —the existence of a Board certification in favor of the union, a proper bargaining demand issued by that union to the employer, and a refusal by the employer to honor the union's demand. See, *e.g.*, *Unifirst Corp.*, 280 N.L.R.B. 75, 76 (1986). In the absence of newly discovered evidence or special circumstances, the General Counsel is not required to relitigate matters that were already decided in the underlying representation case. See *Pittsburgh Plate Glass Co.* v. *NLRB*, 313 U.S. 146, 162 (1941); *Unifirst Corp.*, 280 N.L.R.B. at 76. See also *Magnesium Casting Co.* v. *NLRB*, 401 U.S. 137, 141 (1971); 29 C.F.R. 102.67(f).[20]

In view of the reasonableness of the Board's allocation rule, its consistency with the Act, and the practical considerations that support it, other courts of appeals that have addressed the issue have upheld the Board's rule. See *Beverly Enters.-Mass., Inc.* v. *NLRB*, 165 F.3d 960, 962 (D.C. Cir. 1999); *New York Univ. Med. Ctr.* v. *NLRB*, 156 F.3d 405, 412-413 (2d Cir. 1998); *Schnuck Markets, Inc.* v. *NLRB*, 961 F.2d 700, 703 (8th Cir. 1992); *NLRB* v. *Bakers of Paris, Inc.*, 929 F.2d 1427, 1445 (9th Cir. 1991). These rulings, of

were directly reviewable. See *Boire*, 376 U.S. at 478-479; *AFL*, 308 U.S. at 409-411 & nn. 2-3.

[20] Indeed, to require the General Counsel to relitigate such representation issues would defeat Congress's objective of securing a prompt resolution of those issues. See note 19, *supra*.

course, comport with the guidance provided by this Court's analogous precedent in *Transportation Mgmt. Corp.*, which upheld the Board's discretion to provide for a reasonable allocation of the burden of proof in another context. 462 U.S. at 403. The court of appeals erred in failing likewise to uphold the Board's allocation rule here.

III. THE RNs WORKING AT CANEY CREEK ARE NOT SUPERVISORS

Applying its interpretation of "independent judgment" and the rule that the burden of proving an employee's supervisory status falls on the party asserting it, the Board reasonably concluded that the RNs working at Caney Creek are "employees" rather than "supervisors." The court of appeals therefore erred in refusing fully to enforce the Board's order.

A. *Direction of LPNs and Rehabilitation Assistants.* The RNs working at Caney Creek "are responsible for medical services, particularly when there are no doctors in the building, which is frequently the case." Pet. App. 16a; see J.A. 17. The RNs provide hands-on medical care to the residents, including providing medications, doing physical assessments of the residents, and taking care of complaints, such as stomach aches or cuts. J.A. 52; see also J.A. 31 (RNs also conduct treatment groups for residents). "[F]or the most part," the RNs "work independently and by themselves without any subordinates." Pet. App. 52a.

The "RNs may occasionally request other employees to perform routine tasks, but they apparently have no authority to take any action if the employee refuses their directives." Pet. App. 51a; J.A. 54. For example, the RN may direct an LPN to pass a particular medication to a particular resident at a particular time, or

direct a rehabilitation assistant to assist her in treating a resident who is "really acting out." See J.A. 18, 57-58, 59-61.

Neither the LPNs nor the rehabilitation assistants, however, report to the RNs; the LPNs report to the nursing coordinator, and the rehabilitation assistants report to the unit coordinators. J.A. 30, 34, 45, 61. Thus, in issuing directions, the RN acts as the more skilled member of a team. J.A. 51, 54, 57. The directions are based on the RN's experience and special professional competence and are circumscribed by the requirements of the resident's treatment plan. See J.A. 10-11, 12, 13, 46, 54, 70-75; p. 5 & note 1, *supra*. The Board therefore reasonably concluded that the RNs do not exercise "independent judgment" when they give directions to the LPNs and rehabilitation assistants. See Pet. App. 52a-53a; decisions cited on pp. 16-21 & notes 5-8, *supra*.

B. *Building Supervisor Responsibilities.* The Board also reasonably concluded that the RNs do not exercise "independent judgment" in carrying out any supervisory functions in their roles as building supervisors. Pet. App. 53a. There is no formal job description for the building supervisor position, and it carries no extra compensation. J.A. 37. There is no policy as to which of the two RNs on duty on a particular shift is the building supervisor. J.A. 37, 42, 51. The same RN may be an ordinary nurse on one day of the week and the building supervisor on another, or an ordinary nurse at the start of her shift and the building supervisor later in her shift. J.A. 22-23, 36, 42. The RNs are not notified at what point during their shift they assume their building-supervisor responsibilities. J.A. 50-51.

Although a memorandum issued by respondent states that the building supervisors are "in charge of the facility and all rehabilitation staff" (J.A. 62), the Board reasonably concluded that, as a practical matter, "the only extra responsibility assumed by the RNs when serving as 'building supervisors' is to obtain needed help if for some reason a shift is not fully staffed" (Pet. App. 51a). The building supervisors do not consider themselves to be in charge of the rehabilitation staff. J.A. 50. Respondent's Administrator testified that the building supervisors' responsibility is "[p]rimarily to ensure that there's adequate coverage" and that coverage concerns prompted creation of the role. J.A. 18, 27; see J.A. 20.

Ensuring adequate staff coverage. The building supervisors' responsibilities with regard to staff coverage are routine and do not involve the exercise of independent judgment. Respondent's staffing policies specify the minimum number of employees necessary to cover a given shift. J.A. 23-24, 28-29. The building supervisors transfer employees from one unit to another for the particular shift simply "[t]o make sure the head count is there." J.A. 29; see J.A. 22, 27. Because virtually no judgment is involved in making such a prescribed numerical assessment, the Board could reasonably conclude that the RNs do not act as supervisors in discharging this function. See Pet. App. 53a.

As the court of appeals found, when the RNs serve as building supervisors, they have authority to "call employees into work" or "ask employees to remain on duty," but they have no "authority to force an employee to work." Pet. App. 16a; see J.A. 19-20, 38. The Board correctly found that, in carrying out those functions, the RNs follow a procedure established by respondent that, as a practical matter, leaves them little room for the

exercise of judgment or discretion. Pet. App. 50a, 51a, 53a. J.A. 19-20, 28, 64. Moreover, the RN who testified in the representation proceeding stated that she calls one of the senior staff stipulated to be supervisors "before [she] even ask[s] somebody to stay over a couple hours." J.A. 52; see also J.A. 53. The Board reasonably concluded that the discharge of this function does not make the RNs supervisors, particularly since they cannot require an employee to work. Pet. App. 53a. See, *e.g.*, *Providence Ala. Med. Ctr.* v. *NLRB*, 121 F.3d 548, 552-553 (9th Cir. 1997) (finding similar duties "more clerical than supervisory"); *NLRB* v. *Harmon Indus., Inc.*, 565 F.2d 1047, 1050-1051 (8th Cir. 1977) (supervisory status not conferred by authority to request employees to work overtime on a voluntary basis); see also *NLRB* v. *Adco Elec. Inc.*, 6 F.3d 1110, 1118 (5th Cir. 1993) (employee not supervisor even though he requires other employees to work overtime on some occasions because he is "following company policy and [management's] instructions that overtime should be used to complete a job rather than incurring travel expenses to complete the work on a subsequent day").

Service as highest ranking employee on site. The court of appeals deemed it significant that the building supervisor "is the highest ranking employee in the building" for "almost two thirds of the day." Pet. App. 16a, 18a. A stipulated supervisor is, however, "on call" at those times. *Id.* at 16a; J.A. 39; see also J.A. 52, 53. As the Board has repeatedly concluded in cases involving various industries, the fact that an employee is the highest ranking employee on site for significant periods of time does not compel a finding that the employee is a

supervisor under Section 2(11).[21] Nothing in the definition of supervisor suggests that service as the most senior employee on site triggers supervisory status under the Act. 29 U.S.C. 152(11). See *VIP Health Servs., Inc.* v. *NLRB*, 164 F.3d 644, 649-650 (D.C. Cir. 1999) (if an employee "do[es] not possess Section 2(11) supervisory authority, then the absence of anyone else with such authority does not then automatically confer it"); *Res-Care*, 705 F.2d at 1467 ("A night watchman is not a supervisor just because he is the only person on the premises at night, and if there were several watchmen it would not follow that at least one was a supervisor.").

Purported disciplinary authority. Finally, the Board reasonably concluded that respondent did not prove its contention that the RNs, acting in their capacity as building supervisors, have authority to discipline, or effectively to recommend discipline of, other employees. A memorandum issued by respondent stated that the RNs have authority to "write up" employees who do not "comply" with requests that they work their shifts on units that would otherwise be understaffed. Pet. App. 16a, 18a; J.A. 63. Further, as the court of appeals noted, respondent's Administrator testified that the RNs, when acting as building supervisors, have authority "[to] send an employee home, but the nurse would then need to inform that employee's immediate supervisor." Pet. App. 17a; J.A. 20-21, 26.

[21] See, *e.g.*, *Washington Post Co.*, 254 N.L.R.B. at 204; *Golden West Broadcasters-KTLA*, 215 N.L.R.B. at 762; *National Broad. Co.*, 160 N.L.R.B. at 1440-1441; *Security Guard Serv., Inc.*, 154 N.L.R.B. 8, 10 (1965), enforced, 384 F.2d 143 (5th Cir. 1967); *William C. Meredith Co.*, 74 N.L.R.B. 1064, 1068 (1947).

The Board discounted the significance of the RNs' putative authority to "write up" employees because there was "no evidence in the record that they have ever" done so. Pet. App. 51a; see J.A. 55-56. There was also no evidence in the record that the ability to "write up" another employee is a supervisory function that results in disciplinary action against the employee. To the contrary, the evidence suggested that any employee can document a possible disciplinary infraction by another employee in an "incident report," and the nursing or unit coordinator makes the decision whether discipline is appropriate. Pet. App. 51a; J.A. 14-15, 31. In the only instance in the record in which "an RN made a complaint about another employee it was apparently ignored" by management. Pet. App. 51a. The record evidence also established that the RNs had never exercised their purported authority to send employees home. See J.A. 26-27, 38, 55-56.

Because respondent bears the burden of proving that the RNs are supervisors, see pp. 36-42, *supra*, the record supports the Board's conclusion (Pet. App. 52a) that the RNs do not have actual authority to "discipline" other employees or "effectively to recommend such action." 29 U.S.C. 152(11). See, *e.g.*, *Beverly Enters.*, 165 F.3d at 963 ("Statements by management purporting to confer authority do not alone suffice."); *Oil Workers Int'l Union* v. *NLRB*, 445 F.2d 237, 243-244 (D.C. Cir. 1971) ("the nearly total lack of evidence of authority actually exercised" negated "naked designations of 'paper power'"), cert. denied, 404 U.S. 1039 (1972); *NLRB* v. *Security Guard Serv., Inc.*, 384 F.2d 143, 149 (5th Cir. 1967) ("A supervisor may have potential powers, but theoretical or paper power will not suffice."); *NLRB* v. *Southern Bleachery & Print Works, Inc.*, 257 F.2d 235, 239 (4th Cir. 1958) ("em-

ployer cannot make a supervisor out of a rank and file employee simply by giving him the title and theoretical power to perform one or more of the enumerated supervisory functions"), cert. denied, 359 U.S. 911 (1959). Cf. *Health Care & Retirement Corp.*, 328 N.L.R.B. No. 156 (described in note 7, *supra*).

Accordingly, under established principles applied by the Board and the courts in the administration of the Act in a wide variety of employment contexts, the Board's determination that RNs in this case are covered by the Act should have been upheld.

CONCLUSION

To the extent that the court of appeals held that the RNs employed by respondent are supervisors, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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